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THE STATUS OF THE RULE REQUIRING PRIVITY IN BREACH OF WARRANTY ACTIONS IN CALIFORNIA

By T. C. BLACK*

The liability of a seller of personal property to persons other than his immediate buyer is a problem which has long troubled courts, lawyers, legal writers and law students alike. The most common remedies of the buyer are by statutory, negligence, or warranty actions. It is with this latter that this article is concerned. The oft-stated rule is that to maintain such an action for warranty, the parties must be in a relation of contractual privity.¹ The status of this rule in California has recently been characterized as "in a state of flux."² To determine the aptness of this description is the problem at hand.

Introduction

The necessary privity is of course present where the person who bought the goods brings suit against the person who sold him the goods. But when someone not the seller is made the defendant, or when someone not the buyer is the plaintiff, then privity in its usual sense is absent. This problem may arise in any of a number of ways. Usually it occurs: (1) where the retail buyer transfers the goods to a third person or where the goods were purchased by the retail buyer to be used or consumed by a third person; or (2) where the buyer seeks to hold the manufacturer of goods responsible though he has actually purchased them through a retailer or one or more intermediary distributors.

As an example of the first situation, consider the purchase of goods by the wife which were intended to be used by the husband. Assuming that the husband were somehow injured by a defect in the goods, there would be no privity in the usual case between him and the retailer and he would have no remedy in an action for the warranty. Of course, if the wife herself had been injured, then she could have maintained the suit, but only for her own damages. The second situation would normally arise where the manufacturer appears to be the only financially responsible party. Under modern marketing methods, it is probably the general rule that one or more wholesalers, retailers, or distributors may function between the manufacturer and the ultimate consumer of the goods. In theory, each vendor would be in privity only with his own vendee.³ As a practical matter, the retailer might often not be sufficiently solvent to afford the consumer his relief. Likewise, any financial irresponsibility along this chain would relieve the parties above from the burden imposed by the warranty.

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¹ WILLISTON, SALES, § 244 (rev. ed. 1948).

² Young v. Aeroil Products Co., 248 F.2d 185, 190 (9th Cir., 1957).

³ For the *reductio ad absurdum* of this proposition, see: Kasler & Cohen v. Slavonski, [1928] 1 K.B. 78, 96 L.J.K.B. 850, where there was a series of five warranty actions before the manufacturer was ultimately held liable.

The injustices which have arisen from the somewhat artificial requirement of privity have led courts and attorneys alike to devise ways to avoid the consequences of strictly logical adherence to the general rule. In some cases, an agency may be found so as to constitute the buyer the legal representative of the consumer.⁴ In the common situation of a purchase for the benefit of other members of the family, the lack of actual authority is the greatest hindrance to implement this theory. Some courts have contemplated the idea of warranties running with the goods by analogy to the law of real property, despite the lack of common law authority for this proposition.⁵ Others have found an implied assignment by the buyer to the consumer of the action for the breach of warranty on goods transferred by the buyer.⁶ Again, the usual facts of the purchase for the family benefit would not adequately support this theory in reason. In some rare cases, an offer for a unilateral contract might be found embodied in the advertising of the manufacturer made generally to the public and to be accepted by the purchase or use of a certain product.⁷ The resulting contract would provide the necessary relation of privity of the parties. One of the more tenable theories advanced is that of a third party beneficiary contract.⁸ Under this view, any sale might be made with the intent to benefit the ultimate consumer of the goods. Here, the payment by a person other than the one injured would not necessarily be a bar to privity. The difficulty is in finding the intent to benefit sufficiently made out from the facts of an ordinary sale. This might be especially difficult where the seller knows nothing of the buyer or what the buyer intends doing with the goods.

With the adoption of the Uniform Sales Act by California in 1931,⁹ the rule was by no means clarified. The Act does not expressly make the requirement that parties be in a relation of contractual privity in order to maintain an action on a warranty. Instead, the rights and liabilities of the parties in matters of warranties are stated in terms of "the buyer" and "the seller."¹⁰ But nowhere are found the terms of consumer, manufacturer, user, or such other nomenclature as would expressly indicate that privity would not be required. However, "buyer" is further defined as the "person who buys, or agrees to buy, or any legal successor in interest of such person." (Emphasis added.)¹¹ The phrase "successor in interest" is likewise employed in defining the word "seller." So far, "legal successor" has not been held to include all consumers. An argument might be made that a consumer who received the goods from the actual buyer thereby succeeds to the buyer's interest in the goods. By force of the Sales Act, then, such a consumer could also succeed to all rights of action for the warranty such as

⁴ Ryan v. Progressive Grocery Stores, 255 N.Y. 388, 175 N.E. 105 (1931).

⁵ Patargias v. Coca Cola Bottling Co., 322 Ill. App. 117, 74 N.E. 2d 162 (1947); *Contra*: Pezel v. Yerek, 56 Cal. App. 304, 205 Pac. 475 (1922).

⁶ Tennebaum v. Pendergast, 55 Ohio L. Abs. 231, 90 N.E. 2d 453 (1948).

⁷ Carlill v. Carbolic Smoke Ball Co., 1 Q.B. 256 (1893).

⁸ Singer v. Zabelin, 24 N.Y.S. 2d 962 (1941).

⁹ CAL. CIV. CODE §§ 1721-1800.

¹⁰ CAL. CIV. CODE § 1735.

¹¹ CAL. CIV. CODE § 1796(1).

the original buyer possessed. The courts have not construed the meaning to go beyond the traditional ideas of privity. As will be seen later, where an exception is made to the rule, the California courts have merely extended the meaning of the word "buyer" to include those not necessarily in privity with the seller.

The California Approach to Privity

The early California cases followed the strict rule that required privity,¹² although several cases indicated that the court might favorably view an action by a person other than the buyer under the proper circumstances.¹³ In *Jensen v. Berris*,¹⁴ the plaintiff was a member of a club which held dinners at regular intervals, distributing the costs by rotating the duty to pay among the members. At one of these dinners, for which the plaintiff had not paid, she became sick due to food poisoning found to be a result of the dinner served. In allowing the plaintiff to recover for breach of warranty, the court said that the fact that the plaintiff did not personally offer the purchase price would not allow the defendant restaurant to deny the privity.

The first major exception to the rule was made in the leading case of *Klein v. Duchess Sandwich Co.*¹⁵ Here, the plaintiff's husband had purchased a sandwich which was manufactured by the defendant Duchess Sandwich Co., and sold by another defendant, one Kilpatrick, the owner of the restaurant where the food had been purchased. The wife ate a portion of the sandwich which was infested with maggots and as a result became sick. She brought the action on a breach of the implied warranty of fitness for the mental and physical injury suffered. It was held that lack of privity would not bar recovery from the manufacturer. This, in effect, allowed one not the ultimate buyer to recover from one not the retail seller. The court noted the conflict of authorities concerning the question of privity as applied to the sale of food and drugs. In the light of various statutes which are aimed at safeguarding public health, the pure food and drug acts,¹⁶ and other contemporary legislation, the court said in reference to Section 1735 of the Civil Code of California:¹⁷

In adopting the statute here concerned as a part of the Uniform Sales Act, it was the clear intent of the legislature that, with respect to foodstuffs, the

¹² *Binion v. Sasaki*, 5 Cal. App. 2d 15, 41 P.2d 585 (1935); *Cliff v. Calif. Spray Chemical Co.*, 83 Cal. App. 424, 257 Pac. 99 (1927).

¹³ *Dryden v. Continental Baking Co.*, 11 Cal.2d 33, 77 P.2d 833 (1938); *Jensen v. Berris*, 31 Cal. App. 2d 537, 88 P.2d 220 (1939).

¹⁴ 31 Cal. App. 2d 537, 88 P.2d 220 (1939).

¹⁵ 14 Cal.2d 272, 93 P.2d 799 (1939); *Accord: Vacarezza v. Sanguinetti*, 71 Cal. App. 2d 687, 163 P.2d 470 (1945); *Rubino v. Utah Canning Co.*, 123 Cal. App. 2d 18, 266 P.2d 470 (1945).

¹⁶ CAL. HEALTH & S. CODE, §§ 26450-26461 (Pure Food Act), §§ 26200-26208 (Pure Drug Act).

¹⁷ 14 Cal.2d at 283, 93 P.2d at 804.

implied warranty provision therein contained should inure to the benefit of any ultimate purchaser or consumer of food; and that it was not intended that a strict "privity of contract" would be essential for the bringing of an action by such ultimate consumer for asserted breach of the implied warranty.

The court also answered another objection of the defendant manufacturer that the plaintiff was not the "buyer" within the terms of the Sales Act. The injustice of such a construction of the statute was emphasized by the court. They illustrated it by the example of the parent purchasing food for his infant child. The applicability of various theories, especially that of a third party beneficiary contract was discussed. In the final analysis, however, the court did not attempt to fit the decision into one of the precise, albeit artificial, categories. Instead, it merely held that privity is not required in this particular type of action. The consumer is entitled to the judicial protection through the broad policies behind the apparent legislative intent to protect the consuming public in sales of food and medicine.¹⁸

Another apparent exception to the general rule was made in the case of *Free v. Sluss*.¹⁹ There, the Appellate Department of the Superior Court in Los Angeles County held that a manufacturer might not employ the defense of lack of privity where there was a printed guarantee of quality on the goods themselves. The defendant was a manufacturer of soap. A retail grocer had purchased a number of cases of the defendant's soap from a wholesaler and had found that the soap was unmerchantable. The label was found to make an express warranty of quality and it was held that the manufacturer could not deny the warranty where it was addressed to those who would deal in the product. With the increasing use of advertising on labels and containers of goods sold to the general public, the effect of this exception may become more important.

A similar situation in which an exception was likewise made is where the express warranty is made directly to the purchaser or consumer by the manufacturer. In the case of *Southern California Enterprises v. Walter & Co.*,²⁰ the plaintiff arranged to buy a carpet which was to be made by the defendant manufacturers. By agreement with the defendant, the carpet was then purchased through an intermediary who made the actual sale to the plaintiff. In reference to the rule requiring privity and the pertinent sections of the Civil Code, the court said:²¹

There is no implication in these sections that an express warranty by a manufacturer of merchandise to a user on condition that he purchase the goods from an intermediary is not valid.

¹⁸ The rule of the *Klein* case is limited on its facts to foodstuffs. But as the rationale was the policy implicit in the Pure Drug Act as well as the Pure Food Act, it would seem logical that the rule might include drugs and medicines. The point is undecided so far in California.

¹⁹ 87 Cal. App. 2d Supp. 933, 197 P.2d 854 (1948).

²⁰ 78 Cal. App. 2d 750, 178 P.2d 785 (1947).

²¹ *Id.* at 760, 178 P.2d at 790.

The general rule, then, was held not to be applicable to this type of situation. To summarize briefly, these cases present two major exceptions to the rule which have thus far been judicially recognized in California: (1) where the implied warranty is of foodstuffs; and (2) where there is an express warranty by the manufacturer, either on the label or package or made personally to the consumer.

Container Warranty

A further question which arises in the sale of foods is that of the container. The problem is further complicated when there is no actual sale of the container itself, but instead it is bailed with the expectation that it will be returned. On principle, it would seem that in either case the plaintiff should recover, regardless of a lack of privity. There seems little reason or logic in limiting the warranty on the container of food further than its contents. If there is a public policy which favors the warranty of the food and which can be derived from a legislative intent, the same would hold true of the container. The Agricultural Code expressly provides a certain duty of care as to containers of milk.²² It has been suggested, with reason it is believed, that the same policy governing the warranty of food would therefore extend to the container as well. The question of whether or not there was a bailment of the container should likewise not deprive the consumer of a remedy. Section 1735 of the Civil Code asserts that the warranty is on all "goods *supplied* under a contract to sell or a sale" (emphasis added), and does not limit itself expressly to those goods which were actually the subject of the sale. The container passes as a necessary item in the sale, thus it should be included in the warranty to effectuate the logical intent of the statute. The question has not yet been squarely determined in California, although there is dicta to the effect that the warranty might *not* extend to the container without the necessary privity.²³ However, as a matter of fact, most of the cases involving containers have successfully turned for the plaintiff on some other grounds than warranty, usually negligence.²⁴

Arguments Against the Privity Requirement

It should be mentioned here that the tort liability of the manufacturer for negligence does not depend any longer on privity of contract in most courts. The early common law rule of *Winterbottom v. Wright*²⁵ originally held that privity was essential. As the exceptions to this rule became more numerous, especially in the cases where the article manufactured was an

²² CAL. AGRIC. CODE § 701.

²³ *Escola v. Coca Cola Bottling Co.*, 24 Cal.2d 453, 150 P.2d 436 (1944); *Gerber v. Faber*, 54 Cal. App. 2d 674, 129 P.2d 485 (1942).

²⁴ See *Zentz v. Coca Cola Bottling Co.*, 39 Cal.2d 436, 247 P.2d 344 (1952); *Gordon v. Aztec Brewing Co.*, 33 Cal.2d 514, 203 P.2d 522 (1949); *Escola v. Coca Cola Bottling Co.*, 24 Cal.2d 453, 150 P.2d 436 (1944); *Honea v. City Dairy, Inc.*, 22 Cal.2d 614, 140 P.2d 369 (1943).

²⁵ 10 M.&W. 109, 152 Eng. Rep. 402 (Ex. 1842).

inherently "dangerous instrumentality," the rule became all but swallowed up in its exceptions. This metamorphosis of the law was recognized in the leading case of *MacPherson v. Buick Motor Company*²⁶ wherein a rule was stated to the effect that the manufacturer of goods offered for sale is liable to all persons who might be expected to be injured by any defects due to the negligent manufacture of the goods. This rule has been recognized as the law in almost all jurisdictions, including California.²⁷ For the injured party, however, there still remains the practical difficulty of proving the negligence of the manufacturer.

The courts have aided the plaintiff in this respect through the doctrine of *res ipsa loquitur*. By the force of this doctrine, an inference or a presumption of negligence is raised where: (1) the injury is caused by an agency or instrumentality under the exclusive control of the defendant; (2) the accident is of a type which ordinarily does not happen unless someone is negligent; and (3) the injury is not due to any voluntary act or contributory negligence of the plaintiff. As a general rule, all three conditions must be present.²⁸ Where the doctrine is successfully invoked, the inference of negligence is sufficient evidence to get the case before the jury.²⁹

Although the injured consumer's possible remedy for negligence is not primarily within the scope of this comment, it should be mentioned that the action for negligence represents a poor substitute for an action on warranty from the standpoint of the plaintiff. If the consumer is unable to benefit from the doctrine of *res ipsa loquitur*, it would often be practically impossible for him to show negligence on the part of the manufacturer. This is due to the fact that the circumstances and methods of manufacture are peculiarly within the knowledge of the manufacturer. Likewise, the place of manufacture in our modern economy may be thousands of miles away from the place where the injury occurs. And on the other hand, where the doctrine is involved, it might be no less inconvenient for the manufacturer to rebut the inference. This is especially true in those situations where the requirement of control by the manufacturer has been relaxed by the courts as in the case of containers of foodstuffs.³⁰ These extensions of the application of the doctrine of *res ipsa loquitur* have approached the point of applying strict liability without ever quite reaching it in name. This represents a situation where the manufacturer is strictly liable for defects in the contents of a food container, but the container itself is governed by a different

²⁶ 217 N.Y. 382, 111 N.E. 1050 (1916).

²⁷ *Kalash v. Los Angeles Ladder Co.*, 1 Cal.2d 229, 34 P. 2d 481 (1934). See PROSSER, TORTS 500 (2d ed. 1955).

²⁸ PROSSER, TORTS 199-217 (2d ed. 1955).

²⁹ Prosser, *Res. Ipsa Loquitur in California*, 37 CALIF. L. REV. 183 (1949); See also for a discussion of *Burr v. Sherwin Williams Co.*, 42 Cal.2d 682, 268 P.2d 1041 (1954) where there is dicta to the effect that the defendant *must* rebut the inference raised by *res ipsa loquitur* or face the threat of a directed verdict; Note, 43 CALIF. L. REV. 146 (1955).

³⁰ *Gordon v. Aztec Brewing Co.*, 33 Cal.2d 514, 203 P.2d 522 (1949).

rule. As was recently stated by Justice Traynor in a concurring and dissenting opinion where a defect in a milk bottle was involved:³¹

It would clarify the law to repudiate that differentiation openly rather than to circumvent it covertly and haphazardly by leaving juries free to impose strict liability if they so choose under the guise of *res ipsa loquitur*.

As an original question, it would seem that a lack of privity would have little effect on an injured party's ability to recover for breach of warranty. In the beginning, it was an action sounding in tort and brought by a writ of trespass on the case.³² As a tort, it was similar to an action for deceit except that the scienter of the tortfeasor was not required. This view continued for more than a hundred years. Then, in the year 1778, the writ of *assumpsit* was employed in an action for breach of warranty and accepted by the court.³³ The advantages of the use of this writ, especially the ability to plead the common counts, probably accounted for much of its popularity. For, since that time, this writ was used more or less exclusively. The universal use of *assumpsit*, in turn, emphasized a contractual nature of the action and eventually led to the belief that it was the only remedy available. Being based on contract, the requirement of privity was assumed. The general rule, then, is founded on a historical confusion between the ideas of writ and right. The emphasis on the contractual remedy led the courts to lose sight of the original essence of the action—namely a duty which the law imposed on one who assumed to sell goods to the public. With the sole exception of the privity requirement, the action on the warranty is even today closer to tort than to contract. It is governed by the one year statute of limitations for tort actions. Also, it abates at the death of either the injured party or of the person making the implied warranty and survives under the wrongful death statutes. The measure of damages is that of tort. Finally, it is a duty imposed by law rather than by the mutual consent of the parties.

Most of the legal writers who have considered the rule requiring privity have disapproved it on principle.³⁴ This disapproval stems partly from a consideration of the common law backgrounds of the law of warranty before the notion of privity was introduced. Partly, it comes from a broader view of the social policies to be served. Notions of privity and contract that are involved in the law of warranty are largely derived from a time when the distinctions between the manufacturer, retailer, and consumer were fairly uncomplicated. The interested parties dealt face to face. But with the advent of the modern methods of marketing and channels of distribu-

³¹ *Trust v. Arden Farms Co.*, 50 Cal.2d 217, 237, 324 P.2d 583, 595 (1958) (concurring and dissenting opinion).

³² WILLISTON, *SALES* § 195 (rev. ed. 1948); Ames, *History of Assumpsit*, 2 HARV. L. REV. 1 (1888).

³³ *Stuart v. Wilkins*, 99 Eng.Rep. 15 (1778).

³⁴ See, e.g., WILLISTON, *SALES* § 244 (rev. ed. 1948); VOLD, *SALES* § 152 (1931); PROSSER, *TORTS* 511 (2d ed. 1955).

tion, reliance is more and more on the product or its brand name and less on the person doing the actual selling. Therefore, the idea of privity of contract becomes farther and farther removed from what is actually the understanding of the parties involved.³⁵

Recent Trends

Recent attempts to extend the exceptions so far recognized in California have met with only a limited success. In *Burr v. Sherwin Williams Co.*,³⁶ where the defendant was a manufacturer of insecticides and the plaintiff the ultimate buyer, the California Supreme Court held that it was error to instruct the jury that an implied warranty ran with the goods. The exceptions of the *Klein* case and *Free v. Sluss* were cited as the only ones. The general rule was still applicable to other types of goods where there was an implied warranty. It might be noted that the action here was for damages to the crops of the plaintiff, hence the case could be restricted on its facts to cases where there was property damage and not necessarily applied to personal injury situations.³⁷ The rule of the food cases was slightly broadened, however, in another recent case³⁸ in a Federal District Court applying California law where food for consumption by animals was held to be included within the exception of the *Klein* case and the warranty action was allowed despite a lack of privity. Likewise, the exception made in *Free v. Sluss* for the express warranty of the manufacturer which induced the reliance of the plaintiff was restricted specifically to cases of manufacturing in its literal sense. Cutting logs for lumber was held to be outside the scope of the exception and the general rules of privity applied.³⁹

Conclusion

It is submitted that these cases represent an unfortunate trend in the law insofar as they grant or deny recovery on the warranty depending on the existence of privity. The rule of itself should not be an obstacle in the path of the courts if it is felt that the remedy on a warranty should be available in some particular case. The history of warranty itself reveals one approach in a return to the original common law essence of the action—a tort imposing a strict liability on the seller of defective goods. Another approach is by analogy to the development of the law of negligence relating to the “dangerous instrumentality” rule and culminating in the abolition of privity by the courts. Once having accepted the exception to the rule in the case

³⁵ Bogert and Fink, *Business Practice Regarding Warranties in the Sale of Goods*, 25 *ILL. L. REV.* 400 (1930).

³⁶ 42 Cal.2d 682, 268 P.2d 1041 (1954). See note 29 *supra*.

³⁷ This argument is strengthened by the fact that Justice Traynor joined in the opinion although he has been a strong advocate of abolishing the rule requiring privity in cases where personal injury was involved. See: *Escola v. Coca Cola Bottling Co.*, 24 Cal.2d 453, 461, 150 P.2d 436, 440 (1944) (concurring opinion).

³⁸ *McAfee v. Cargill*, 121 F.Supp. 5 (S.D. Cal. 1954).

³⁹ *Collins v. Pope & Talbot Inc.*, 135 Cal. App. 2d 653, 288 P.2d 75 (1955); See also: *Odell v. Frueh*, 146 Cal. App. 2d 504, 304 P.2d 45 (1956).

of foodstuffs as a matter of policy, there seems to be little grounds for restricting it as applied to cases of other kinds. Certainly there is no justification for the distinction to be found in the Sales Act itself, from whence the exception is nominally derived. It is hard to believe that there is a policy favoring a man's stomach to the exclusion of the rest of his body. All parts comprise the person and all are susceptible to injury. It would seem more realistic to examine the rule from the standpoint of the applicable policy reasons surrounding it, instead of compounding more case law authority for the sake of a rule which is a historical anomaly.

The question should not be a question of who has contracted with whom but rather which party is better able to bear the burden of risk arising from the normal and proper use of a product placed on the market by a manufacturer. As a practical matter, it appears that the manufacturer is the one better able to shoulder this difficult burden. It is the manufacturer who is best able to guard against defects and may take precautions of care and insurance against them. The cost of this burden in turn may be effectively distributed only by the producer or manufacturer as a part of the cost of the product and thereby eventually placed on the consuming public. This problem was well stated recently:⁴⁰

The liability of the manufacturer should not turn on whether he has "contracted" to assume it under such erratic tests that haphazardly afford recovery to some and deny it to others. "[P]ublic policy demands that responsibility be fixed wherever it will most effectively reduce the hazards of life and health inherent in defective products that reach the market."

⁴⁰ Traynor, J., in *Trust v. Arden Farms Co.*, 50 Cal. 2d 217, 236, 324 P.2d 583, 589 (1958) (concurring and dissenting opinion).